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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

AMERICAN PAPER INSTITUTE, INC.,

Petitioner,

—v.—

AMERICAN ELECTRIC POWER SERVICE CORPORATION, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., COLORADO-UTE ELECTRIC ASSOCIATION, INC., FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in holding that §§ 210 and 212 of the Federal Power Act provide the exclusive means by which the Federal Energy Regulatory Commission may require utilities to interconnect with qualifying cogeneration and small power production facilities to implement § 210 of PURPA, the Court of Appeals improperly frustrated clearly expressed Congressional intent when it rejected the Commission's contemporaneous construction of these statutes?

2. Whether the Court of Appeals misapprehended or grossly misapplied the appropriate standard of judicial review in setting aside a rule promulgated by the Federal Energy Regulatory Commission under § 210 of PURPA setting a rate for utility purchases of electricity from qualifying alternate energy sources?

PARTIES TO THE PROCEEDING BELOW

Parties before the Court of Appeals in addition to Petitioner and Respondents named in the caption of this case were intervenors Occidental Geothermal, Inc., Elizabethtown Gas Company and Brooklyn Union Gas Company.

LIST OF PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES

A listing of parent companies, subsidiaries and affiliates of Petitioner as required by Rule 28.1 of the Supreme Court Rules appears beginning at p. A-1 of Appendix A hereto.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING BELOW	ii
LISTING OF PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	2
JURISDICTION	2
STATUTORY AND REGULATORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT:	
This Case Presents Important Questions of Federal Law And National Energy Policy	8
A. The Decision Vacating The Commission's Interconnection Rule Will Substantially Frustrate Implementation Of The Important National Policy Expressed In § 210 Of PURPA	8
B. Setting Aside The Interconnection Rule Was An Unwarranted And Improper Departure By The Court Of Appeals From Doctrine Established By Applicable Decisions Of This Court	11
C. By Vacating The Full Avoided Cost Rule The Decision Below Will Cripple A Major Federal Energy Program	14
D. The Decision Vacating The Full Avoided Cost Rule Both Applied The Wrong Standard of Review And Improperly Substituted The Court's Judgment For That Of The Commission	16

PAGE

CONCLUSION 21

Appendix A:

Listing of Parent Companies, Subsidiaries and Affiliates A-1

Statutory and Regulatory Provisions Involved A-7

Appendix B (Separately Bound):

Opinion and Orders of the Court of Appeals B-1

Federal Energy Regulatory Commission Order No. 69, Docket No. RM79-55, February 19, 1980 ..... B-38

Federal Energy Regulatory Commission Order No. 70, Docket No. RM79-54, March 13, 1980 ..... B-120

Federal Energy Regulatory Commission Order Granting in Part and Denying in Part Rehearing of Order Nos. 69 and 70, and Amending Regulations, May 15, 1980 ..... B-175

Judgment of the Court of Appeals B-200

Order and Memorandum of the Court of Appeals Denying Petition for Rehearing B-202

Order of the Court of Appeals Denying Suggestion for Rehearing *En Banc*, and Memorandum of Dissenting Judges B-205

TABLE OF AUTHORITIES

Cases	PAGE
Bowman Transportation, Inc. v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281 (1974)	18
Camp v. *Pitts*, 411 U.S. 138 (1973)	17
Citizens to Preserve Overton Park v. *Volpe*, 401 U.S. 402 (1971)	17, 20
Clark v. *Uebersee Finanz-Korp.*, 332 U.S. 480 (1947)	13
Crown Simpson Pulp Co. v. *Costle*, 445 U.S. 193 (1980)	13
Fawcus Machine Co. v. *United States*, 282 U.S. 375 (1931)	13
FERC v. *Mississippi*, ___ U.S. ___, 50 U.S.L.W. 4566 (June 1, 1982)	5, 10, 11, 16, 19
FPC v. *Natural Gas Pipeline Co.*, 315 U.S. 575 (1942)	18
N.Y. Dep't of Social Services v. *Dublino*, 413 U.S. 405 (1973)	12
Ozawa v. *United States*, 260 U.S. 178 (1922)	14
Permian Basin Area Rate Cases, 390 U.S. 747 (1968)	18
Power Reactor Development Co. v. *International Union of Electrical, Radio and Machineworkers*, 367 U.S. 396 (1961)	12
Train v. *Natural Resources Defense Council*, 421 U.S. 60 (1975)	12
Udall v. *Tallman*, 380 U.S. 1 (1965)	12
Unemployment Commission v. *Aragon*, 329 U.S. 143 (1946)	12
United States v. *American Trucking Ass'n*, 320 U.S. 534 (1940)	14
Vermont Yankee Nuclear Power Corp. v. *NRDC*, 435 U.S. 519 (1978)	19

PAGE

Statutes and Regulations

Public Utility Regulatory Policies Act, P.L. 95-617, 92 Stat. 3117, *et seq.* 4

Section 201, 16 U.S.C. § 796 ..... 4, 5
Section 210, 16 U.S.C. § 824a-3 .....4, 5, 8, 9, 10, 11, 12, 14, 15, 17
Section 210(a), 16 U.S.C. § 824a-3(a) 5, 6, 11, 13, 19
Section 210(b), 16 U.S.C. § 824a-3(b)..... 6
Section 210(d), 16 U.S.C. § 824a-3(d)..... 6
Section 210(e)(1), 16 U.S.C. § 824a-3(e)(1)..... 13
Section 210(e)(3), 16 U.S.C. § 824a-3(e)(3) 7, 9, 11, 13
Section 210(f)(1), 16 U.S.C. § 824a-3(f)(1)..... 15

Federal Power Act, 16 U.S.C. § 792, *et seq.*:

Section 3, 16 U.S.C. § 796 4
Section 210, 16 U.S.C. § 824i.....7, 9, 11
Section 211, 16 U.S.C. § 824j..... 7
Section 212, 16 U.S.C. § 824k 7, 9, 11
Sections 201-209, 16 U.S.C. §§ 824-824h 15
Section 313(b), 16 U.S.C. § 825*l*(b) 4, 17

Administrative Procedure Act, 5 U.S.C. § 500 *et seq.*:

Section 4(c), 5 U.S.C. § 553(c)..... 17

P.L. 96-294, 94 Stat. 770 5

18 C.F.R. Part 292:

Section 292.101(6)..... 6
Section 292.303(c)(1) 7, 8
Section 292.304(b)(2)-(4) 6
Section 292.403 6

Miscellaneous Materials

Order No. 69, Federal Energy Regulatory Commission, Docket No. RM79-55..... 4

PAGE

Order No. 70, Federal Energy Regulatory Commission, Docket No. RM79-54 4

Order Granting in Part and Denying in Part Rehearing of Order Nos. 69 and 70, and Amending Regulations, Federal Energy Regulatory Commission, Docket Nos. RM79-55, RM79-54 ..... 9, 11

Central Power & Light Co., et al., Federal Energy Regulatory Commission, Docket No. EL79-8 9

Brief for Respondent Federal Energy Regulatory Commission in D.C. Cir. Docket No. 80-1789 ..... 6, 9

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner American Paper Institute, Inc. ("API"), intervenor in the proceeding below, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on January 22, 1982 vacating two rules issued by the Federal Energy Regulatory Commission.

OPINIONS BELOW

The opinion of the Court of Appeals is officially reported at 675 F.2d 1226, and is set forth in Appendix B hereto at p. B-1.[1] The order denying rehearing is officially reported at 675 F.2d 1226, 1246, and appears at B-202. The order denying rehearing *en banc*, and the dissenting statement of Circuit Judges Wald and Mikva are officially reported at 675 F.2d 1226, 1247, and are set forth at B-205.

Federal Energy Regulatory Commission ("FERC" or "the Commission") order No. 69, dated February 19, 1980, was published in the Federal Register at 45 Fed. Reg. 12,214 (1980). It appears at B-38. FERC order No. 70, dated March 13, 1980, was published at 45 Fed. Reg. 17,959 (1980), and is reprinted at B-120. The Commission's order of May 15, 1980, granting in part and denying in part rehearing of orders 69 and 70, and amending regulations, was published at 45 Fed. Reg. 33,958 (1980), and is set forth at B-175.

JURISDICTION

The Judgment of the Court of Appeals was entered on January 22, 1982 (B-200). Rehearing and suggestion for rehearing *en banc* were denied on April 9, 1982 (B-202, 205). This petition is filed within 90 days of the date of the denial of rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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1 Citations to the Appendices to this Petition hereafter will refer only to the page number(s), e.g.: A-10, B-10.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves the following statutory and regulatory provisions, set out verbatim beginning at the page number referred to:

	Page
Public Utility Regulatory Policies Act of 1978:	
§ 201, 16 U.S.C. § 796	A-7
§ 210, 16 U.S.C. § 824a-3	A-8
Federal Power Act:	
§ 210, 16 U.S.C. § 824i	A-14
§ 212, 16 U.S.C. § 824k	A-16
§ 313(b), 16 U.S.C. § 825*l*(b), 49 Stat. 860	A-19
Administrative Procedure Act:	
§ 4 (c), 5 U.S.C. § 553(c)	A-20
§ 10(b), 5 U.S.C. § 703	A-21
§ 10(e), 5 U.S.C. § 706	A-21
Rules of the Federal Energy Regulatory Commission:	
"Interconnection," 18 C.F.R. § 292.303(c)(1)	A-22
"Full Avoided Cost," 18 C.F.R. § 292.304(b)(2)-(b)(4)	A-22
"Avoided cost" defined, 18 C.F.R. § 292.101(6)	A-23
"Waiver," 18 C.F.R. § 292.403	A-24

STATEMENT OF THE CASE

This was a review, on the petition of three utilities, of rules regarding cogeneration and small power production which were promulgated by FERC to implement the requirements of §§ 201 and 210 of the Public Utility Regulatory Policies Act of 1978 ("PURPA"), Pub.L. No. 95-617, 92 Stat. 3117 (1978).[2]

Jurisdiction of the Court of Appeals was invoked under § 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b), 49 Stat. 860.[3]

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2 PURPA § 201, which amended § 3 of the Federal Power Act ("FPA"), required the Commission to establish criteria under which cogeneration and small power production facilities could *qualify* for PURPA's benefits. 16 U.S.C. §§ 796(17)-(18). FERC's rules setting up the § 201 criteria were published in order No. 70, as amended, Docket RM79-54. Only one of the provisions of order No. 70—the so-called "fuel use" issue—was challenged. This rule, however, was upheld by the court below, and is not a subject of this petition.

PURPA § 210, on the other hand, was not an amendment to the FPA. It directs FERC to prescribe rules as the Commission determines necessary respecting the *relationship* between qualifying facilities and electric utilities, to "encourage cogeneration and small power production." 16 U.S.C. § 824a-3(a). All of the Commission's rules under § 210 were developed in Docket RM79-55 and published in order No. 69, as amended. Three of those provisions were reviewed along with the "fuel use" rule. One of the three—the "simultaneous purchase and sale" rule—was also upheld and is not, therefore, before this Court.

3 In API's memorandum in support of the Commission's petition for rehearing and suggestion for rehearing *en banc*, API pointed out that § 313(b) of the FPA did not grant the Court of Appeals jurisdiction to review FERC's order No. 69. That order was issued under the authority of § 210 of PURPA, which is not an amendment to the FPA. (*See* n.2, *supra*.) Nothing else in PURPA, API noted, grants jurisdiction to the Court of Appeals to review Commission orders under § 210. API suggested that under these circumstances, the court's assertion of pendent jurisdiction over order No. 69 was a novel and unwarranted extension of that doctrine. The Court of Appeals did not address the issue in denying rehearing.

On November 9, 1978, PURPA was signed into law as part of a comprehensive package of legislation designed to combat the nationwide energy crisis. Earlier this term this Court upheld the constitutionality of PURPA against a facial challenge. *FERC* v. *Mississippi*, (Docket 80-1749) __ U.S. __, 50 U.S.L.W. 4566 (June 1, 1982). As the Court there observed, § 210 of PURPA seeks to encourage the development of cogeneration and small power production facilities because Congress believed that increased use of these sources of electricity would conserve energy and reduce demand for traditional fossil fuels.[4] For example, a cogeneration facility requires about half as much fuel to produce electricity and useful heat as would be required to produce the two separately (B-3). Two problems, however, impeded the development of these non-traditional facilities. One was the reluctance of utilities to purchase their electricity and to sell them needed back-up power. The other was that the burden of state and federal regulation on such facilities discouraged their development (50 U.S.L.W. at 4568).

In order to overcome these problems, PURPA § 210(a) directed that within one year after PURPA became law, FERC was to prescribe such rules as it determined necessary to encourage cogeneration and small power production. Those rules were to be prescribed after consultation with state and federal regulatory agencies, and after public notice and hearings. 16 U.S.C. § 824a-3(a). The Commission rulemaking

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4 A "cogeneration facility" is one that produces both electric energy and steam or some other form of useful energy, such as heat. 16 U.S.C. § 796(18)(A). A "small power production facility" is one that has a production capacity of not more than 80 megawatts and uses biomass, waste or renewable resources (such as wind, water, or solar energy) to produce electric power. 16 U.S.C. § 796(17)(A).

By Public Law 96-294, 94 Stat. 770, which was signed into law on June 30, 1980, Congress added "geothermal resources" to the list of renewable resources in § 796(17) (A).

The statutes printed in Appendix A to this Petition are those in existence at the time the rules under PURPA § 210 were promulgated in February, 1980.

procedures and deliberations were among the most comprehensive it has ever undertaken.[5] The final rules, produced after developing a record of over 4,000 pages of written comments and recorded testimony, cover more than 14 pages in the Code of Federal Regulations, and address virtually every significant aspect of the relationship between qualifying facilities and utilities (B-104-19; B-167-74).

Only four of these rules were challenged in the Court of Appeals; the court vacated two of them. The "full avoided cost" rule was set aside because, the court stated, "FERC has not adequately justified its adoption of the full avoided cost standard" (B-9).[6] The Commission had articulated three bases

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5 *See* Brief for Respondent Federal Energy Regulatory Commission, in the proceeding below, D.C. Cir. Docket No. 80-1789, at p. 23.

6 PURPA § 210(a) directs the Commission to prescribe rules which require electric utilities to offer to purchase electric energy from qualifying facilities. Section 210(b) provides for rules that set a rate for such purchases, but "No such rule . . . shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy." The "incremental cost of alternative electric energy" is defined in § 210(d) as "the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source" (A-10).

Since under § 210(a), the rules had to be promulgated within one year after November 9, 1978, FERC could not set individual rates for each of the utilities in the Nation in case-by-case determinations. Instead, the Commission adopted a single rule applicable nationwide. The rule prescribes a rate for purchases of electricity from newly developed qualifying facilities equal to the purchasing utility's "full avoided cost." These costs are defined, consistent with PURPA § 210(d), as "the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source." 18 C.F.R. § 292.304(b)(2)-(4), and § 292.101(6) (A-22-23).

The rules specifically provide, however, that state regulatory agencies and non-regulated utilities can obtain a waiver from FERC of the requirement that utilities pay full avoided cost to new facilities. 18 C.F.R. § 292.403. (A-24). The rules thus permitted flexibility at the state level in implementing the full avoided cost standard.

and purposes for adopting that rule, but these were deemed by the court to be "inadequate" (B-10-11).

The Court also vacated FERC's "interconnection" rule, as inconsistent with the Federal Power Act ("FPA") because § 210(e)(3) of PURPA provided that no qualifying facility may be exempted from the provisions of §§ 210-212 of the FPA.[7] It dismissed the Commission's interpretation of the statutes as "wholly unconvincing" (B-24) and, although granting that the Commission's construction was "not inherently implausible," found it "counterintuitive and inconsistent with the statute's explicit provisions" (B-24-25).

The Court of Appeals denied the Commission's petition for rehearing and suggestion for rehearing *en banc* (B-205).[8] Two of the five judges voting on the *en banc* suggestion dissented.[9] They would have reheard the case "because of the importance of the issues to major new energy programs," and they expressed their "serious doubts" over the original panel's "resolution of those issues" (B-206).

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7 Since PURPA directed the Commission to promulgate rules requiring utilities to purchase from and sell to qualifying facilities, the interconnection rule facilitated such purchases and sales by requiring that "any electric utility shall make such interconnections with any qualifying facility as may be necessary to accomplish purchases or sales under [the rule]." 18 C.F.R. § 292.303(c)(1). (A-22).

8 API filed a brief in support of the Commission's petition for rehearing *en banc*. API is the trade association of the pulp, paper and paperboard industry in the United States. This industry is the Nation's leader in the self-generation and cogeneration of electric power, and accounts for over 40 percent of all cogeneration in the United States today. As an industry it is also the Nation's third largest *purchaser* of electricity from electric utilities.

9 Circuit Judges Wright, Tamm, MacKinnon, Robb, Edwards and Bork did not participate in the *en banc* order (B-206).

REASONS FOR GRANTING THE WRIT

THIS CASE PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW AND NATIONAL ENERGY POLICY.

This case brings to the Court, for the first time, questions concerning the implementation of PURPA § 210. If allowed to stand, the decision below vacating two of the most crucial rules in the Commission's implementation program will have significant, adverse impacts upon national energy policy and will frustrate the express intent of Congress in enacting PURPA § 210. In setting aside the two rules, the court below disregarded applicable decisions of this Court, and grossly misapplied appropriate standards of judicial review.

A. The Decision Vacating The Commission's Interconnection Rule Will Substantially Frustrate Implementation Of The Important National Policy Expressed in § 210 Of PURPA.

As Congress was aware, a primary obstacle to the development of cogeneration and small power production facilities is the unwillingness of many utilities to purchase the power generated by such facilities, or to sell them the backup power they require (*see* B-4). PURPA § 210 was aimed specifically at removing this obstacle by directing FERC to issue rules requiring utilities to offer to purchase electricity from and sell it to qualifying facilities. Of course, no purchase or sale can take place unless a qualifying facility is connected to the utility's system. The statute is impotent, therefore, unless qualifying facilities have, or can promptly secure, such interconnection.

FERC issued a rule which assured such interconnection by requiring utilities to interconnect "with any qualifying facility as may be necessary to accomplish purchases or sales . . . " 18 C.F.R. § 292.303(c)(1). The Commission did so in order to guarantee qualifying facilities the benefits Congress intended to confer upon them, and thereby to encourage development of cogeneration and small power production as directed by

§ 210 of PURPA (B-179-80). The Commission's rules leave unimpaired the states' traditional role in assuring the safety and reliability of their utilities' systems (B-115-19).

The Court of Appeals struck down the interconnection rule because in its view PURPA § 210(e)(3) prohibited FERC from exempting qualifying facilities from the substantive and procedural requirements of FPA §§ 210 and 212, 16 U.S.C. §§ 824i and 824k.[10] Thus, rather than relieving potential qualifying facilities of the burden of state and federal regulation as Congress intended, the Court of Appeals' decision requires each qualifying facility, in order to obtain the right to interconnect, to meet the onerous substantive and procedural requirements—including an evidentiary hearing at the utility's option—of the Federal Power Act.[11]

The decision below eviscerates the intent of Congress and gives utilities a powerful tool with which they can return to the *status quo ante*. The application, notice, evidentiary hearing and proof requirements involved in case-by-case adjudication of interconnection applications under the FPA are susceptible of abuse by a recalcitrant utility. The possibility that a utility, experienced and resourceful in the ways of regulatory procedure and litigation, may force delays and multiply expenses by

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10 FPA §§ 210 and 212 were amendments to the Federal Power Act added by §§ 202 and 204 of PURPA.

11 Although the court suggested that such procedures may be "streamlined" (B-23), FPA § 210's unequivocal grant of the right to an "evidentiary hearing," 16 U.S.C. § 824i(b)(2), effectively negates the Commission's discretion to expedite procedures. An interconnection case was before FERC at the time the review below was in progress. *Central Power & Light Co., et al.*, Docket No. EL79-8. It had been in administrative pretrial proceedings for 2½ years at that point. *See* Brief for Respondent Federal Energy Regulatory Commission, D.C. Cir. Docket No. 80-1789, at p. 69, n.80. As the judges dissenting from the denial of rehearing *en banc* noted, the panel's suggestion of streamlined procedures was virtually meaningless since it "fails to explain how anything less than an evidentiary hearing would satisfy the requirements it imports from section 210 of the Federal Power Act, 16 U.S.C. § 824i." (B-208, n.3).

contesting an application for interconnection, will discourage many potential qualifying facilities from undertaking the risk and expense of development.

If it remains, therefore, the decision of the Court of Appeals will mean that most qualifying facilities will be able to sell to or purchase from a utility only if the utility is willing—precisely the situation which prevailed prior to PURPA. Hence, PURPA § 210's theoretical assurance of a market for sales of power will provide no practical benefit or encouragement.

Moreover, if the decision below is allowed to stand, its debilitating effects will not be limited to discouraging only the smaller projects. The largest private industrial companies will also forego investment in electric generation rather than disclose competitively sensitive information regarding capacity, planning or costs which would be divulged during the public hearing process required in FPA interconnection proceedings.[12] Furthermore, as a result of the decision below, utilities may abrogate or force renegotiation of existing contracts with qualifying facilities—contracts negotiated based upon the FERC regulations as promulgated two years prior to the decision of the Court of Appeals.[13]

Faced with these obstacles, many otherwise cost-effective and beneficial projects—even those now in the final stages of planning and financing—simply will not go forward. Such substantial adverse effects of the decision below are inconsistent with the national energy policy clearly enunciated by Congress in PURPA § 210, and, on this basis alone, warrant this Court's review.[14]

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12 The generation of electricity is not, of course, the primary business of such companies, and will not be pursued if the expense and effort are too burdensome.

13 Typically, such contracts authorize the utility to cancel or renegotiate if there is a materially adverse change in existing law.

14 As this Court observed in *FERC* v. *Mississippi, supra,* Congress determined that the development of such facilities would conserve

B. Setting Aside The Interconnection Rule Was An Unwarranted And Improper Departure By The Court Of Appeals From Doctrine Established By Applicable Decisions Of This Court

The rulemaking authority Congress gave to FERC was stated in the broadest terms in PURPA § 210: to prescribe "such rules as it [FERC] determines necessary to encourage cogeneration and small power production." 16 U.S.C. § 824a-3(a). The statute also unequivocally demands that those rules require utilities to offer to sell electricity to and purchase electricity from qualifying facilities.[15] In the face of this command, the Commission recognized the frustration of Congress' purpose that would result if utilities refused to interconnect with qualifying facilities and forced them to engage in lengthy interconnection proceedings under FPA §§ 210 and 212 (B-58). Accordingly, FERC interpreted PURPA's grant of authority to it either to order interconnection in specific instances (under FPA §§ 210 and 212) if a utility wanted to interconnect with a reluctant cogeneration or small power production facility, or to require interconnection by rule, if "necessary to encourage cogeneration and small power production" (under PURPA § 210), when a qualifying facility applied for such interconnection. (B-58-61; B-179-82).[16]

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energy, and, equally significantly, the "evidence before Congress showed the potential contribution of these sources of energy: it was estimated that if proper incentives were provided, industrial cogeneration alone could account for 7%-10% of the Nation's electrical generating capacity by 1987." (50 U.S.L.W. at 4570).

15 In light of the mandatory language of PURPA § 210(a)(1) and (2) that FERC "shall prescribe . . . rules" "which rules require electric utilities to offer to" sell to and purchase from qualifying facilities, no party challenged that aspect of the rules. The attack was more subtle.

16 This construction rationalized PURPA §§ 210(a) and 210(e)(3) by providing for full hearings when facilities were the *targets* of interconnection requests, while encouraging the development of such facilities when, as *applicants* for interconnection, they are assured a market for their electricity. This distinction, targets versus applicants, furthered

FERC's harmonious construction of these statutes was inherently reasonable. The court below, however, gave cavalier treatment to the Commission's interpretation, contrary to this Court's long-standing teaching that " 'the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong' " (*N.Y. Dep't of Social Services* v. *Dublino*, 413 U.S. 405, 421 (1973) (citation omitted)).[17]

This doctrine carries particular weight where the agency is contemporaneously construing newly enacted legislation (*Power Reactor Development Co.* v. *International Union of Electrical, Radio and Machineworkers*, 367 U.S. 396, 408 (1961)):

> "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new' "[18] (citation omitted).

Even if the court below had an equally reasonable construction, its rejection of the interpretation given by FERC was antithetical to the doctrine enunciated by this Court in *Train* v. *Natural Resources Defense Council*, 421 U.S. 60, 87 (1975):

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the Congressional goal by encouraging facilities to qualify and promptly negotiate interconnection arrangements. The Court of Appeals rejected this harmonizing of the provisions of § 210 as "counterintuitive" and "inconsistent," while acknowledging that it was "not inherently implausible" (B-24-25).

17 *See also Udall* v. *Tallman*, 380 U.S. 1, 16 (1965) ("This Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration").

18 *See also Unemployment Commission* v. *Aragon*, 329 U.S. 143, 153 (1946) ("To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings").

> "We therefore conclude that the Agency's interpretation of [separate provisions of the statute] was 'correct' to the extent that it can be said with complete assurance that any particular interpretation of a complex statute such as this is the 'correct' one. Given this conclusion, as well as the facts that the Agency is charged with administration of the Act, and that there has undoubtedly been reliance upon its interpretation by the States and other parties affected by the Act, we have no doubt whatever that its construction was sufficiently reasonable to preclude the Court of Appeals from substituting its judgment for that of the Agency."[19]

The decision below, however, has construed PURPA § 210(e) in a manner which *unreasonably* denies FERC the very power Congress so obviously sought to give it. By limiting FERC to "the literal meaning of the statutory sections," (B-23) the Court of Appeals' ruling necessarily imputes to Congress the contradictory intention to encourage cogeneration and small power production with one hand in §§ 210(a) and (e)(1), and to stifle it with the other in § 210(e)(3).

In adopting a construction of the statute premised on such an absurdity, the court below disregarded numerous decisions of this Court. *See Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, 489, (1947) (a literally exclusionary definition was construed as "merely illustrative," because "to do otherwise would be to impute to Congress a purpose to paralyze with one hand what it sought to promote with the other"); *Crown Simpson Pulp Co.* v. *Costle*, 445 U.S. 193, 196-97 (1980) ("absent a far clearer expression of congressional intent, we are unwilling to read the [Federal Water Pollution Control] Act as creating such a seemingly irrational . . . system"). Indeed, the judges

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19 *See also Fawcus Machine Co.* v. *United States*, 282 U.S. 375, 378 (1931) ("[the regulations] constitute contemporaneous construction by those charged with the administration of the Act, are for that reason entitled to respectful consideration, and will not be overruled except for weighty reasons").

dissenting from the 3-2 vote denying rehearing below were troubled precisely because of this incongruous construction of the statute (B-208):

> "The alternative interpretation is a plausible one and appears to be more closely in line with Congress' expressed desire to encourage cogeneration. This alternative reading should receive closer scrutiny by this court before it erects a formidable, perhaps insurmountable, roadblock to a major energy program."[20]

C. By Vacating The Full Avoided Cost Rule The Decision Below Will Cripple A Major Federal Energy Program

In setting aside the full avoided cost rule, the Court of Appeals created a critical gap in the comprehensive regulatory framework promulgated to implement PURPA. Owners of potential qualifying facilities, and prospective investors, are now without the basis necessary to estimate revenue streams for their projects. Moreover, without a mutually understood starting point for determining the maximum price a utility could be required to pay absent agreement, price negotiations between utilities and qualifying facilities will be unduly prolonged—a discouraging prospect at best for project developers.[21] Operators of facilities that must depend on project

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20 *See also Ozawa* v. *United States*, 260 U.S. 178, 194 (1922) (court will give statute "effect in accordance with its design and purpose, sacrificing, if necessary the literal meaning in order that the purpose may not fail"); *United States* v. *American Trucking Ass'n*, 310 U.S. 534, 543 (1940) (when statutory language produces results divergent from Congressional purpose, "this Court has followed that purpose, rather than the literal words").

21 Nothing in the rules precludes a utility from paying at a rate other than "avoided cost." What the rule assures is that a utility will pay "avoided cost" if the utility and qualifying facility cannot agree on some other mutually acceptable rate. As a practical matter, however, utilities retain such great leverage that most contracts which have been signed to date are at a rate below full avoided cost. Without full avoided cost as a starting point for negotiations, a hostile utility will easily be able to evade its obligation under PURPA § 210 to offer to purchase electricity.

financing, such as many small hydro-electric projects, are particularly sensitive to risk factors affecting cash flow. The delay while a new rule is promulgated, created by the Court of Appeals' holding, will compel large industrial companies to find other uses for their internally-generated investment capital.

Even qualifying facilities which are presently in place and selling power are in jeopardy because of the decision below. A qualifying facility selling power to a utility in accordance with the rules but without benefit of a contract, or pursuant to a contract cancellable in the event of a materially adverse change in the existing law—a not uncommon provision in regulated industries—is now in danger of peremptory cancellation of the arrangement, unless the facility accepts the utility's terms.

Ironically, if the holding below prevails, state regulatory agencies that have already implemented or wish to implement the program outlined by PURPA § 210 face substantial obstacles in attempting to repair the damage done to the FERC rules. Each state agency must now determine whether it is authorized to set *any* rates for utilities' purchases of power from qualifying facilities. This will require consideration whether its authorities and actions are constitutional under the Commerce Clause, or whether they may be preempted by the rate regulation provisions in Title II of the FPA. 16 U.S.C. §§ 824-824h. Even if a state agency finds that it has sufficient authority to establish rates for purchases, it still faces a considerable administrative burden in developing a record to support any particular rate.[22]

Inevitably these doubts and delays will have a substantial debilitating effect on the most significant aspect of the regulatory scheme contemplated by PURPA § 210—state agency

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22 Any revision of the full avoided cost rule will result in further delay while the states implement the revision pursuant to PURPA § 210(f)(1). 16 U.S.C. § 824a-3(f)(1). Many projects will not survive such a delay.

consideration and implementation.[23] Qualifying facility investors and developers will not be able to rely on state regulators as a relatively inexpensive, locally available enforcement option. Until the rate at which utilities can be required to purchase power from qualifying facilities is finally determined, state regulators will be unable to take action reasonably designed to give effect to FERC's rules. The uncertainty cast on this important federal program by the decision below makes this case, therefore, a particularly compelling one for review by this Court.

D. The Decision Vacating The Full Avoided Cost Rule Both Applied The Wrong Standard of Review And Improperly Substituted The Court's Judgment For That Of The Commission

The decision of the court below setting aside the Commission's full avoided cost rule will, if permitted to stand, signal a new and unfortunate intervention of the judiciary into the province of administrative rulemaking.[24] The opinion of the Court of Appeals undermines principles of judicial review established by this Court which attempt to maintain the separation of functions between the courts and administrative agencies. The decision below will inevitably inhibit informal rulemaking by agencies which employ that useful process. The potential harm of the decision is compounded because it issued from the Court of Appeals for the District of Columbia Circuit, in which perhaps the bulk of all agency appellate reviews are brought, and to which many other courts look for guidance on matters of administrative law.

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23 As this Court observed in *FERC* v. *Mississippi, supra*, the FERC regulations "afford state regulatory authorities and nonregulated utilities latitude in determining the manner in which the regulations are to be implemented." (50 U.S.L.W. at 4568.)

24 Unlike the interconnection rule, respondents did not challenge the Commission's authority to issue a rule setting a rate for the purchase of power by utilities. Their challenge, upheld by the court below, was to the wisdom of the rate set by FERC—the utility's full avoided cost.

As the dissenters from the denial of the petition for the rehearing *en banc* accurately noted, the panel below apparently assumed that the substantial evidence test governs review of rules promulgated under PURPA § 210 (B-207, n.2).

The court's application of the substantial evidence test to the avoided cost rule was apparently the result of an erroneous assumption—that the Court of Appeals had jurisdiction to review PURPA § 210 rules directly under § 313(b) of the FPA, which prescribes the substantial evidence test for review of Commission actions under the FPA. 16 U.S.C. § 825*l*(b). *See* n.3, *supra*. Even if the court below properly assumed pendent jurisdiction over review of the PURPA § 210 rules, however, the appropriate standard of review is *not* a matter of the court's discretion. The Administrative Procedure Act, not the FPA standard, applies to the court's review of the rules. Thus, the dissenters observed that (B-207, n.2):

> "PURPA, however, does not set forth a heightened standard of review. The avoided cost rule is therefore subject to the general requirements of the APA, and may be overturned if it is 'arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).' "[25]

Under the "arbitrary or capricious" standard, "[t]he court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971). And while the agency must set out the reasons for its rules in a "concise general statement of [the rules'] basis and purpose," APA § 4(c), 5 U.S.C. § 553(c), it is not required thereby to provide detailed and comprehensive findings of fact. *Camp* v. *Pitts*, 411 U.S. 138, 143 (1973); *see also*

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25 The panel did not set aside the full avoided cost rule because it was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." Rather it disagreed with the reasons given by FERC when adopting the rule because, in the panel's view, they were "inadequate" (B-10-11). Thus, the panel both applied the wrong standard of review and substituted its views for that of the rulemaker.

Bowman Transportation, Inc. v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 290 (1974) ("we can discern in the Commission's opinion a rational basis for its treatment of the evidence, and the 'arbitrary and capricious' test does not require more").

Subjecting the Commission's rules to the wrong standard of review, the court then proceeded to misapply that standard and set aside the carefully considered rule establishing the rate at which utilities could be required to purchase power from qualifying facilities. It has long been settled, however, that "Courts are *without authority* to set aside *any* rate selected by the Commission which is within a 'zone of reasonableness.' " *Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968) (emphasis added), quoting from *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 585 (1942).

The court below quoted from legislative history demonstrating that FERC's avoided cost rule was within the range of the "just and reasonable" rates Congress intended to authorize (B-9-10). Nevertheless it set the rule aside because it was at the upper bound of that range (B-11-12) on the stated basis that FERC's reasons for adopting the rule were "inadequate" (B-11). It then went substantially further, directing FERC on remand to consider numerous additional "concerns" which the court had and "to take a harder look" at the court's preferred rate (B-12).[26] In short, the court substituted its judgment of a reasonable rate for that of the Commission.

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26 The dissenters on the *en banc* question did not understand the need for any additional determinations by FERC (B-207):

> "The panel rejected the Commission's determination for failure to explain adequately how utility consumers' interests had been accommodated, specifically with respect to rejection of one particular alternative to fully avoided costs. As we read the Commission's opinion, however, it found that the appropriate balance of statutory interests had been struck in a rate that would encourage cogeneration without raising rates to consumers. This determination seems reasonable, and we doubt that any further explanation, especially in the way of factual findings, *see* at 1234, was necessary to satisfy the requirements of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A)."

The panoply of conditions, factual investigations, findings, alternative considerations and detailed explanations required of FERC, if permitted to stand, will impose upon informal rulemakers a standard even more formidable than the one which prompted this Court's admonishment in *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 547-48 (1978):

> "If the agency is compelled to support the rule which it ultimately adopts with the type of record produced only after a full adjudicatory hearing, it simply will have no choice but to conduct a full adjudicatory hearing prior to promulgating every rule."

The instant case is an even more egregious judicial imposition than that in *Vermont Yankee* because the facts and evidence required by the court here were not quantifiable at the time the rules were issued. No one had the market experience necessary to develop the data which the Court of Appeals insisted be considered, even in a full adjudicatory hearing.[27] FERC's handicap was compounded by a statutory compulsion to issue rules within one year of the passage of the Act. PURPA § 210(a), 16 U.S.C. § 824a-3(a).[28]

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27 Indeed, the panel's criticism of FERC for not adopting a percentage of full avoided cost rate does not demonstrate a failing by FERC. Rather it seeks to give the utilities another opportunity to convince FERC that a lesser rate should apply. Thus, the panel stated (B-12):

> "FERC should allocate the benefits more evenly between the cogenerators and the utilities *if the utilities can demonstrate* that, under a percentage of avoided cost approach, an allocation less heavily favoring the cogenerators is in the public interest and the interest of the utilities' electric consumers, and will not disproportionately discourage cogeneration" (emphasis added).

Moreover, the court's "disproportionately discourage cogeneration" standard turns § 210 of PURPA on its head. As this Court observed in *FERC* v. *Mississippi, supra*, "Section 210 of PURPA . . . seeks to encourage the development of cogeneration and small power production facilities." (50 U.S.L.W. at 4568).

28 Unlike the court below, however, Congress and the Commission understood that this urgently-implemented program would need to be "from time-to-time, revise[d]". PURPA § 210(a), 16 U.S.C. 824a-3(a).

Finally, it is not clear that *any* explanation of the full avoided cost rule would have satisfied the panel below, since it appears that it was primarily FERC's *conclusion*, and not its failure to comply with proper standards of rulemaking, that displeased the court. Thus, when the panel rejected FERC's challenge to the standing of the petitioners below, it foretold the intended effect of its decision on the rule (B-7 at n.26):

> "If petitioners prevail before this court, *the rule will be changed* to permit the states *to allow the petitioners to purchase electricity at prices lower than those now required*" (emphasis added).

Hence, the court below, consciously or not, substituted its judgment for that of the agency charged by Congress with the proper administration of the statute. Such judicial activism is improper. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971).

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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